Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-615

ARTHUR H. KEYES and LUCILLE KEYES,
On behalf of themselves and others similarly situated,
Petitioners

v.

THE DISTRICT OF COLUMBIA COURT OF APPEALS, et al.,
Respondents

MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF MANDAMUS AND PETITION FOR WRIT OF MANDAMUS

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MOTION FOR LEAVE TO FILE

PETITION FOR

WRIT OF MANDAMUS

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1977

NO.

ARTHUR H. KEYES and
LUCILLE KEYES,
On behalf of themselves and
others similarly situated,

Petitioners

v.

THE DISTRICT OF COLUMBIA
COURT OF APPEALS, et al.,

Respondents

MOTION FOR LEAVE TO FILE PETITION FOR
WRIT OF MANDAMUS

Petitioners respectfully move this Court for leave to file the petition for writ of mandamus, hereto annexed, under Section 1651 of Title 28 of the United States Code, directed to the District of Columbia Court of Appeals,

and particularly the Honorable Catherine B. Kelly, the Honorable George R. Gallagher, and the Honorable Hubert B. Pair, Judges of the District of Columbia Court of Appeals.

Respectfully submitted,

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PETITION FOR

WRIT OF MANDAMUS

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1977

NO.

ARTHUR H. KEYES and
LUCILLE KEYES,
On behalf of themselves and
others similarly situated,

Petitioners

v.

THE DISTRICT OF COLUMBIA
COURT OF APPEALS, et al.,

Respondents

PETITION

FOR A WRIT OF MANDAMUS TO THE DISTRICT OF COLUMBIA COURT OF APPEALS, AND PARTICULARLY TO THE HONORABLE KELLY AND THE HONORABLE GALLAGHER, ASSOCIATE JUDGES AND THE HONORABLE PAIR, ASSOCIATE JUDGE, RETIRED, OF SAID COURT OF APPEALS

Petitioners, Arthur and Lucille Keyes,

et al., pray that a writ of mandamus issue to the District of Columbia Court of Appeals and particularly to the Honorable Catherine B. Kelly and the Honorable George R. Gallagher and the Honorable Hubert B. Pair, Judges of said Court of Appeals, directing and commanding the aforesaid judges and the District of Columbia Court of Appeals to withdraw and stay the Court's mandate in the District of Columbia v. Keyes, 362 A.2d 729 (1976), solely to allow petitioners to apply for a writ of certiorari to the Supreme Court of the United States.

OPINIONS BELOW

The per curiam order of the District of Columbia Court of Appeals in the instant case denying petitioners' Motion to Withdraw and Stay the Court's Mandate Pending Application to the Supreme Court of the United States for a Writ of Certiorari is unreported and is reprinted in the Appendix, infra, p. A-1.

The per curiam order of the District of Columbia Court of Appeals denying petitioners' "Motion to The Court En Banc to Withdraw the Mandate of This Court in No. 8790 Issued April 26, 1977 During this Same Term in Order to Prevent Injustice and Grant Hearing En Banc in No. 8790 Because of District of Columbia v. Burlington Decided June 13, 1977" is unreported and is reprinted in the Appendix, infra, p.A-3.

JURISDICTION

The jurisdiction of this Court is invoked under Section 1651(a) of Title 28, United States Code.

Petitioners have sought the relief requested here from the highest court in the District of Columbia and have been denied. Therefore, this Court is the only court that can now grant the relief sought.

QUESTION PRESENTED

If the Petitioners ultimately prevail in the Supreme Court through the writ of certiorari process and the result is an order to the District of Columbia Court of Appeals to withdraw its mandate and to grant petitioners a hearing en banc would not petitioners be denied their constitutional right to a hearing if that relief were rendered worthless for the reason that the current term of the District of Columbia Court of Appeals had by then expired?

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution provides in part:

> No person shall. . .be deprived of life, liberty or property, without due process of law. . .

STATEMENT OF THE CASE

Petitioners seek a withdrawal and stay of mandate in order to file a timely petition for a writ of certiorari from an order

of the District of Columbia Court of Appeals of September 13, 1977 denying Petitioners "Motion to the Court En Banc to Withdraw the Mandate of This Court in No. 8790 Issued April 26, 1977 During this Same Term In Order to Prevent Injustice and Grant Hearing En Banc in No. 8790 Because of District of Columbia v. Burlington, Decided June 13, 1977". (Appendix, infra, p. A-5)

On September 22, 1977 petitioners moved the District of Columbia Court of Appeals to withdraw and stay its mandate in District of Columbia v. Keyes, pending application to the Supreme Court for a writ of certiorari. Petitioners' Motion was denied, per curiam, on October 11, 1977.

The mandate in this case issued April 26, 1977 during the present term of the District of Columbia Court of Appeals,

and petitioners' "Motion to the Court En Banc to Withdraw the Mandate, etc." was timely filed during the present term of Court. Petitioners intend to file a petition for a writ of certiorari within the time allowed by law. However, pursuant to Rule 2 of the Rules of the District of Columbia Court of Appeals, the current term of the Court of Appeals will expire on December 31, 1977. Petitioners cannot predict that the writ of certiorari process will be completed before December 31, 1977. It can, however, be assumed that should the writ be granted, any further proceedings in the Supreme Court will not be completed during the current term of the Court of Appeals. (January 1 to December 31, 1977.)

Petitioners are simply asking this Court to order the Court of Appeals to withdraw and stay its mandate during the pen-

dency in this Court of the petitioners' petition for a writ of certiorari.

REASONS FOR GRANTING THE WRIT

Petitioners' petition for a writ of certiorari will be irreparably prejudiced if the mandate of the District of Columbia Court of Appeals is not withdrawn and stayed pending the preparation, filing, consideration and decision on the petition and any further proceedings in the Supreme Court of the United States.

Petitioners will suffer irreparable harm if the mandate is not withdrawn and stayed while petitioners seek Supreme Court review of their serious due process claims set forth in the "Motion to The Court En Banc to Withdraw the Mandate, etc." denied by the District of Columbia Court of Appeals on September 13, 1977. There can be no prejudice to respondents from the granting of this motion. The

granting of the motion will, however, safeguard petitioners' due process rights to an effective remedy should petitioners prevail in the Supreme Court during the next term of the District of Columbia Court of Appeals.

CONCLUSION

In the absence of the issuance of a writ of mandamus by this Court, the District of Columbia Court of Appeals will have successfully deprived petitioners of due process of law.

Petitioners respectfully urge that the Writ of Mandamus issue.

Respectfully submitted,

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APPENDIX

DISTRICT OF COLUMBIA
COURT OF APPEALS

FILED Oct 11 1977

Alexander L. Stevas
Clerk

NO. 8790 January Term, 1977

THE DISTRICT OF COLUMBIA
a Municipal Corporation, and
WALTER E. WASHINGTON, and
KENNETH BACK,

Appellant

v. Tax Div.No. 2214

ARTHUR H. KEYES, JR., and
LUCILLE KEYES,
On behalf of themselves and
others similarly situated,

Appellees.

BEFORE: Kelly and Gallagher, Associate Judges, and Pair, Associate Judge, Retired.

ORDER

On consideration of appellees' motion to withdraw and stay this Court's mandate pending application to the Supreme Court of the United States for a writ of certiorari, it is

ORDERED that appellees' motion is denied.

PER CURIAM

Copies to:

Honorable Joyce Hens Green
Associate Judge, Superior Court
of the District of Columbia

Clerk, Superior Court of the
District of Columbia

Louis P. Robbins, Esquire
Principal Deputy Corporation Counsel

Gilbert Hahn, Jr., Esquire
1150 Connecticut Avenue NW, 20036

DISTRICT OF COLUMBIA
COURT OF APPEALS

FILED Sep 13 1977

Alexander L. Stevas
Clerk

NO. 8790 January Term, 1977

THE DISTRICT OF COLUMBIA
a Municipal Corporation, and
WALTER E. WASHINGTON, and
KENNETH BACK,

Appellants,

v. Tax Div.No. 2214

ARTHUR H. KEYES, JR., and
LUCILLE KEYES,
On behalf of themselves and
others similarly situated,

Appellees.

BEFORE: Newman, Chief Judge; Kelly, Kern, Gallagher, Nebeker, Yeagley, Harris and Mack, Associate Judges; Pair, Associate Judge, Retired.

O R D E R

On consideration of appellees' "Motion to the Court En Banc to Withdraw the Mandate of this Court in No. 8790 Issued April 26, 1977 During This Same Term in Order to Prevent Injustice and Grant Hearing En Banc in No. 8790 Because of District of Columbia v. Burlington Decided June 13, 1977" and of responsive pleadings filed with respect

thereto, it is

ORDERED by the Court en banc that appellees' aforesaid motion is denied.

PER CURIAM

Copies to:

Honorable Joyce Hens Green
Judge, Superior Court of the District of Columbia

Clerk, Superior Court of the District of Columbia

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DISTRICT OF COLUMBIA
COURT OF APPEALS

REC'D JUL 7 1977

Alexander L. Stevas
Clerk

DISTRICT OF COLUMBIA, a Municipal Corporation, and WALTER E. WASHINGTON and KENNETH BACK	:	
Appellants	:	
v.	:	NO. 8790
ARTHUR H. KEYES, JR., and LUCILLE KEYES, On behalf of themselves and others similarly situated	:	
Appellees	:	

MOTION TO THE COURT EN BANC TO WITHDRAW THE MANDATE OF THIS COURT IN NO. 8790 ISSUED APRIL 26, 1977 DURING THIS SAME TERM IN ORDER TO PREVENT INJUSTICE AND GRANT HEARING EN BANC IN NO. 8790 BECAUSE OF DISTRICT OF COLUMBIA v. BURLINGTON DECIDED JUNE 13, 1977

Come now Appellees in the above-entitled case, through counsel, and pray to the entire bench of this Court that it withdraw the mandate of this Court in No. 8790 issued

April 26, 1977 in order to prevent injustice and, following the withdrawal of the mandate, grant a hearing en banc. As grounds therefor appellees state the following:

1. Relief Requested: Appellees move the Court for the following relief:

(a) Withdrawal of the mandate in No. 8790 issued April 26, 1977, and

(b) Granting a hearing en banc.

2. Grounds for Relief.

The panel of the Court which adjudicated the Keyes matter created two basic "due process" problems.

(i) The panel specifically requested the parties to comment on the applicability of Burlington I which had been drafted by a panel containing two of the judges who were considering Keyes. The full Court later vacated Burlington I prior to the

Keyes decision. Nevertheless, the panel decided Keyes on the vacated principle of Burlington I asserting an absence of subject-matter jurisdiction.

(ii) The vacating of Burlington I was communicated to the District but never communicated to counsel for the Keyes taxpayers. This gave the District a one-sided advantage over the Keyes taxpayers and prevented counsel for the taxpayers from taking advantage of the vacating of Burlington I. Only a hearing can redress that damage. At that hearing, counsel can reargue the appeal based on the non-existence of the Burlington I principle.

3. What happened.

District of Columbia v. Keyes, 362 A. 2d 729 (1976) was argued December 5, 1974.

Following briefing and argument, on February 27, 1976, the panel (Judges Kelly, Gallagher and Pair) issued an Order as follows:

> This cause came on for consideration on the record on appeal and the court heard argument of counsel. A question has arisen which the parties did not cover in their briefs, and accordingly, the Court desires the parties to submit supplemental memoranda addressed to the following question:
>
> Bearing in mind (a) that this Court in District of Columbia v. Green, (310 A.2d 848 (1973)) specifically approved the trial court's finding that an injunctive remedy was available in that case due to the "exceptional and extraordinary" circumstances there presented (at 853) and (b) that this Court recently reiterated that proposition in District of Columbia v. Burlington Apartment House Co. T/A The Burlington Hotel, D.C.App., A.2d ___ (No. 7986, January 29, 1976) at pages 4-5 of the slip opinion, are the appellees in this case barred from the relief sought by reason of their failure to pursue their statutory remedies in seeking refunds for the fiscal year here involved? In addressing themselves to the question, the parties should discuss District of

> Columbia v. Berenter, 151 U.S. App. 196, 466 F.2d 367 (1972). (Emphasis supplied.)
>
> Counsel for appellants shall cause their supplemental memorandum to be filed on or before March 8, 1976, and counsel for appellees shall cause their memorandum to be filed on or before March 15, 1976, and counsel shall cause their respective pleadings to be personally served on opposing counsel.
>
> Per Curiam

The District filed its memorandum on March 15, 1976. Taxpayers filed their memorandum on March 24, 1976. On April 23, 1976 this Court vacated the January 29, 1976 Burlington I opinion. See page 2 slip opinion in D.C. v. Burlington decided June 13, 1977 (Burlington II).

On April 23, 1976, counsel for the District of Columbia was notified that Burlington I had been vacated. Counsel for the Keyes taxpayers was never so notified.

Keyes was decided on July 23, 1976 specifically on the Burlington I principle, but without mentioning Burlington I by name. Taxpayers moved timely on September 16, 1976 for rehearing and hearing en banc. Of course, taxpayers did not include in that motion the overwhelming argument that Keyes had been decided on the Burlington I principle after Burlington I had been vacated. They could not have included this argument because only the District was informed that Burlington I had been vacated.

4. What harm did this do?

What happened caused two kinds of harm: substantive and procedural.

(A) The substantive harm. The key holding in Keyes was to some extent forecast in the February 27, 1976 question to counsel: viz: "Are the Appellees in this case barred from relief sought by reason

of their failure to pursue their statutory remedies in seeking refunds for the fiscal year here involved?" In other words, were the Keyes taxpayers barred from all jurisdiction in the Superior Court to have a tax refund because they had not first taken their case to the Board of Equalization and Review?

The only case in the District of Columbia that had ever supported such a principle was Burlington I.

But, before Keyes was decided, Burlington I was vacated by the full Court without notice to counsel for taxpayers. Keyes was then decided on the Burlington I principle of "failure to pursue their statutory remedies."

Let us look at this Court's opinion in Keyes.

> Recovery of taxes illegally or erroneously assessed and voluntarily paid was not permitted at common law and is a matter with-

in the purview of the legislative branch. Therefore, refunds of taxes so assessed and paid will not be made absent an authorizing statute. District of Columbia v. McFall, 88 U.S. App.D.C. 217, 188 F.2d 991 (1951); Lindner v. District of Columbia, D.C.Mun.App., 32 A.2d 540 (1943). Under the statutory procedure applicable to this case, the recovery of refunds through appeal to the Superior Court requires, as a first step, a complaint to the Board of Equalization and Review. Subject matter jurisdiction of the Superior Court does not attach until that prerequisite has been satisfied, and a refund based on a final determination of the Superior Court presupposes that the taxpayer has complied with the procedure mandated by the legislature. If "aggrieved" for any reason, the taxpayer must appeal within the permitted time to the Board of Equalization and Review. D.C. Code 1973 § 47-709. This was not done in this case. The taxpayers failed to follow their administrative remedies for fiscal year 1973. (Keyes, 362 A.2d 732-3) (Emphasis supplied.)

Further, the Court issued a warning that taxpayers would "bypass the Board at great peril." (Keyes, Footnote 11, 362 A. 2d, supra at 734)

11. We note that the fiscal year 1974 taxpayers who resorted to the Board of Equalization and Review and raised the issue of unequal debasement factors found the Board unresponsive to their arguments. Hence, in Green, where only injunctive relief was sought, we stated that a taxpayer in that case had "no meaningful ability to challenge his assessment at all" because the Board declined to inquire into the non-judgmental aspects of the assessment process. District of Columbia v. Green, supra at 856. This was one of the extraordinary circumstances upon which the grant of injunctive relief in Green was based. However, the fact that an administrative body may wrongly perceive the nature or scope of its powers or responsibilities in a given instance is not a justification for bypassing that body in all instances when it is an essential element in a procedure of purely statutory origin. In fact, it would be a rare instance when taxpayers would not bypass the Board at great peril.

The substantive harm in all this is that not one word of this was the decided law of the District of Columbia on the date the Keyes decision came down. Burlington I, which had said exactly this, had been withdrawn and vacated. There was no hold-

ing in any other decision in the District that bypassing the Board excluded all jurisdiction in the Superior Court to hear a tax refund case.

Nothing sustained the key sentence in Keyes: "Subject matter jurisdiction does not attach until that prerequisite (complaint to the Board) has been satisfied."

When the Burlington case was ultimately decided in 1977, following reargument en banc, (Burlington II) the principle of Burlington I was specifically repudiated.

> We begin by clarifying what is not at issue in this case. Unquestionably there are jurisdictional prerequisites to the Superior Court's consideration of a taxpayer's challenge. See D.C. Code 1973, §§ 47-709, -2403, and -2404; D.C. Code 1976 Supp., § 47-646(i). See also George Hyman Construction Co. v. District of Columbia, D.C.App., 315 A.2d 175 (1974); District of Columbia v. Berenter, 151 U.S.App.D.C. 196, 466 F.2d 367 (1972). Prior payment of the tax assessed and due

> at the time of the filing of a petition in the Tax Division of the trial court is one such prerequisite. Under certain circumstances, the taxpayer first must complain to the Board of Equalization and Review before seeking relief in the trial court. (Emphasis supplied.)

What are the "certain circumstances" which require prior complaint to the Board?

The answer is more obviously defined by stating the circumstances where prior complaint is not required.

As this Court said: (Burlington II, slip opinion, pp. 9-10)

> If we were to accept the District's argument, Burlington would be compelled to contest a particular assessment--already in the process of being shown to be unlawful--through the Board to the Superior Court in every successive fiscal year. Such a multiplicity of litigation on a single issue not only would be impractical and inequitable, but also has been deemed unwarranted by this court. In District of Columbia v. Green, D.C.App., 310 A.2d 848 (1973), we held that when taxpayers can

> show that in reality they had no effective administrative remedy, the fact that they have "bypass[ed] the useless administrative procedure" will not deprive the trial court of the power to grant equitable relief. It is plain that any appeal to the Board concerning the 1974 assessment, based as it inevitably would have been on the identical arguments which the Board already had rejected in connection with the 1973 assessment, would have been a futile procedure which the taxpayer should not be penalized for bypassing. (Emphasis supplied.)

This is exactly the situation in Keyes, a class action for 33,000 taxpayers on exactly the same single issue, where there can be no denial of "multiplicity of litigation", "useless administrative procedure" and "futile procedure".

Even more striking is the effect of the dissenting opinion in Burlington II, which was signed by the two judges who had written the majority opinion in Keyes.[1/] It says:

> The statutory scheme for re-

1/ Judge Pair, now retired, was also on the Keyes panel.

> lief from allegedly inaccurate fiscal year assessments is found in D.C. Code 47-709 et al. and the administrative remedies outlined there must be exhausted. . . Appellee had an adequate remedy at law to contest his 1974 assessment but failed to invoke the jurisdiction of the Superior Court. . .D.C. v. Keyes. (slip opinion, pp.13-17)

How can all this be summarized?

Keyes was decided by two judges[1/] based on a legal principle of subject-matter jurisdiction contained in a vacated preliminary Burlington opinion, which was followed by a final Burlington opinion declaring exactly the opposite principle of subject-matter jurisdiction. And the two judges who decided Keyes filed a dissent in the final Burlington opinion citing Keyes as the support for their dissent.

Here is the ultimate bootstrap on which 33,000 taxpayers are deprived of their just recovery on the basis of an

1/ Judge Pair, now retired, was also on the Keyes panel.

asserted absence of subject-matter jurisdiction.

(B) The Procedural Harm. The Corporation Counsel as counsel in Burlington, was notified in the Burlington case on April 23, 1976 that Burlington had been withdrawn and vacated and that the case had been set for argument en banc. Counsel for the Keyes taxpayers who were not counsel in Burlington was never notified of this either by the Court or by the Corporation Counsel.

The slip opinion in Burlington I was printed and distributed prior to its being withdrawn and vacated. However, the order withdrawing and vacating the opinion in Burlington I was never published anywhere.[2/]

2/ We have verified with the Clerk's Office that the opinions and withdrawals are normally sent to West Publishing Co. and Washington Law Reporter. We have verified with the managing editor of the Washington Law Reporter that Burlington I and the order vacating that opinion were not published because neither was ever received by the Washington Law Reporter. Neithef the opinion nor the withdrawal were ever published by the West Publishing Co.

How would anyone know the opinion had been vacated? Up to the date the final opinion was issued in Burlington II, only by checking this Court's docket in Burlington would any lawyer know that the preliminary opinion in Burlington I had been withdrawn and vacated.

Even more striking is the fact that the vacating of Burlington I was apparently not fully circulated in the Corporation Counsel's office.

A series of cases was tried before Judge John G. Penn in the Tax Division of Superior Court, during the period March 1, 1976 to June 1, 1977 in each of which Burlington I was cited to Judge Penn by the Assistants Corporation Counsel with no disclosure that Burlington I had been vacated. It is clear that the particular Assistants Corporation Counsel who were handling those cases were not

aware of the vacating of Burlington I and, obviously, Judge Penn and opposing counsel in these cases were not aware of it.[3/]

3/ (a) D.C.R.L.A. and L'Enfant Plaza Properties, Inc. v. D.C., Tax Docket 2290. Trial Court's Memorandum Order and Trial Findings, citing Burlington I, was entered March 23, 1976 and the final order was signed 4/14/76. District of Columbia's Notice of Appeal was filed 5/14/76 but was subsequently withdrawn by stipulation.

(b) D.C.R.L.A. and Bresler and Reiner, Inc. v. D.C., Tax Docket 2288: Trial Court's opinion and order was dated April 30, 1976 and it cited Burlington I. Final Order was signed May 26, 1976. No appeal was taken by the District of Columbia.

(c) D.C.R.L.A. and Bresler and Reiner, Inc. v. D.C., Tax Docket 2289. Trial Court Opinion and Order was dated September 30, 1976 and cited Burlington I. Final Order was signed October 20, 1976. District of Columbia filed a notice of appeal and then dismissed the appeal.

(d) D.C.R.L.A. and Trilon Plaza Co. v. D.C., Tax Dockets 2311 and 2374 were tried in February and March, 1976 and are awaiting decision in the Trial Court. There were repeated citations to the Burlington I opinion during the course of the trial.

(e) D.C.R.L.A. and Trilon Plaza Co. v. D.C., Tax Docket 2372: The case was tried May 17 and 18, 1977 and during the trial there were repeated citations to Burlington I. The case was settled by stipulation between the parties.

Burlington I was also cited by counsel in Petitioners' Motion for Judgment filed in October,

The lack of procedural due process is obvious.

Before the panel decided Keyes it specifically asked for comment on Burlington I on February 27, 1976. The comments were filed March 15, 1976 and March 24, 1976. Burlington I was then withdrawn and vacated April 23, 1976 without notice to counsel for taxpayers. Keyes was decided on July 23, 1976 squarely based on the Burlington I principle, but with no reference to the fact that the Court had vacated Burlington I.

Counsel for Keyes were deprived of the powerful value of the vacating of

3/ (cont'd)
1976 in Tax Dockets 2369, 2370, 2375, and 2374.

The citations of Burlington I in those cases in no way changes the results of those cases, but the fact that the Court and both parties freely cited Burlington I during the period March 1, 1976 - July 1, 1977 shows clearly that they were unaware they were citing a vacated opinion.

Burlington I and the substantial doubt thereby cast on the validity of the Burlington principle.

Counsel for Keyes, in preparing the petition for reargument in Keyes filed September 16, 1976, did not include the overwhelming argument that Keyes had been decided on the Burlington I principle after Burlington I had been vacated, with notice only to one side in the case.

If we had been told that Burlington I had been vacated, our petition for rehearing en banc filed September 16, 1976 would have contained a paragraph something like the following:

> "This opinion is identical with the opinion in Burlington handed down on January 29, 1976. Like Burlington, it finds that the failure to follow the administrative path annuls the subject-matter jurisdiction of the Superior Court. Burlington has been vacated by this Court and has been set down for rehearing en banc before the full Court.

> This case should receive identical treatment, since it raises the identical issue of subject-matter jurisdiction.
>
> We respectfully request that the opinion in Keyes be similarly vacated, and the appeal held in abeyance until the decision in Burlington, or preferably listed for argument en banc on the same day that Burlington will be heard."

We are confident that this Court in September, 1976 would without question have granted us the same treatment as Burlington.

The demands of equal treatment for both sides and due process require that the appellees have a fair hearing before this Court. In the words of Justice Frankfurter, Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 71 S.Ct. 624, 643-44 (1951) (concurring opinion):

> . . ."due process," unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances. Expressing as it does in its ultimate analysis respect enforced by law for that feeling of just treatment which

has been evolved through centuries of Anglo-American constitutional history and civilization, "due process" cannot be imprisoned within the treacherous limits of any formula. Representing a profound attitude of fairness between man and man, and more particularly between the individual and government, "due process" is compounded of history, past course of decisions, and stout confidence in the strength of the democratic faith which we profess. It is not a yardstick. It is a process. It is a delicate process of adjustment inescapably involving the exercise of judgment by those whom the Constitution entrusted with the unfolding of the process.

Taxpayers respectfully ask the Court for the "just treatment" required by the due process guarantee.

5. Withdrawal of Mandate.

(a) Grounds. The mandate in No. 8790 issued April 26, 1977. This is in the January 1977 term. See Rule 2 of the Rules of this Court. It is within the power of this Court to withdraw the mandate

for "good cause". See Greater Boston Television Corp. v. FCC, 149 U.S.App.D.C. 322, 463 F.2d 268, 276-79 (D.C.Cir. 1971) (Leventhal, Tamm and MacKinnon J.J.).

Decision to recall mandate by an appellate court will be granted for "good cause" shown. "Good cause" is the showing of a need to avoid injustice. It has a foundation in the inherent power of the court[4/] and may be done during the term the mandate issued.[5/]

The basic principle authorizing an appellate court to vacate any judgment is as may be just under the circumstances.

4/ In federal courts the power is also statutory. 28 USCA §2106.

5/ In federal courts the mandate may issue outside the term. 28 USCA §452.

Greater Boston Television Corp., supra.[6]

(b) Effect. No one is hurt by the withdrawal of the mandate. The position of the District has not changed. No money has been spent by the District in reliance on the mandate. The parties are in exactly the same position they were in in 1973.

6/ We do not think the District will object on procedural grounds in any case. In the U. S. Court of Appeals in No. 74-1482, Met. Wash. Coalition for Clean Air v. D.C., after the Court had issued its mandate and summarily ordered the closing of Incinerator #5, the District, without any grounds, moved March 13, 1975 to recall the mandate. A copy of the District's motion is attached (Exhibit A). As will appear, the Court on March 31, 1976 granted the motion, which had been opposed. As a result, the District was ultimately able to reverse the result, preventing the closing of the Incinerator. A copy of the Court's Order recalling mandate is attached (Exhibit B).

Conclusion

This case, in essence, raises a deceptively simple issue. The panel which wrote the Keyes opinion in July, 1976 squarely decided that the Superior Court had no subject-matter jurisdiction over the controversy (everything else said in the opinion is the rankest dictum). That decision was based on an earlier Burlington I opinion in January, 1976 signed by the same two judges who wrote the majority opinion in Keyes. That earlier opinion had been vacated by the full court in April, 1976 before Keyes was written. The two judges, however, repeated in Keyes in July what had been vacated in April by the full court. Counsel for Keyes was never informed directly or indirectly, that the earlier Burlington I opinion had been vacated by the full Court and based all of his subsequent actions in

the case on the assumption that this earlier Burlington I opinion was still in full force and effect.

Promptly upon learning the true fact that the full Court had vacated that opinion before Keyes was decided, counsel for Keyes filed this motion.

It is rather hard to think of a series of events which more effectively could deny the 33,000 Keyes taxpayers equal protection of the laws and the right to a full and fair hearing.

Respectfully submitted,

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Counsel for Appellees

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion to the Court En Banc to Withdraw the Mandate of this Court in No. 8790 Issued April 26, 1977 During this Same Term in Order to Prevent Injustice and Grant Hearing En Banc in No. 8790 Because of District of Columbia v. Burlington Decided June 13, 1977, was mailed, postage prepaid, this 7th day of July, 1977, to Louis Robbins, Esq., Assistant Corporation Counsel, D.C., District Building, 14th and E Streets, N. W., Washington, D. C. 20004, Counsel for Appellants.

GILBERT HAHN, JR., ESQ.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 74-1482	)	
	)	
Metropolitan Washington Coali- tion for Clean Air, et al.	)	
	)	
v.	)	Civil Ac- tion 1424-73
	)	
District of Columbia, et al.	)	
	)	
Appellants	)	
	)	
No. 74-1507	)	
	)	
Metropolitan Washington Coali- tion for Clean Air, et al.	)	
	)	
Appellants	)	
	)	
v.	)	Civil Ac- tion 1424-73
	)	
District of Columbia A Municipal Corporation	)	

MOTION TO RECALL MANDATE

On the grounds and for the reasons set forth below, appellee-appellants in the above-entitled cause move the Court to recall the mandate issued on March 11, 1975.

The order issued by the Court granting the motion of the Metropolitan Washington Coalition for Clean Air for summary reversal

in No. 74-1507, dismissing the appeal in 74-1482, and directing the Clerk to promptly certify the order to the District Court has left the appellee-appellants without an opportunity to move the Court for reconsideration of its order. The order states that an opinion of Court will be filed at a later date. Until the appellee-appellants have had the opportunity to study the opinion of this Court, they will have no way of determining the grounds upon which the Court has entered the order.

The Court is therefore requested to recall its mandate in order to give the appellee-appellants the opportunity to move this Court for reconsideration should that be advisable after the

opinion has issued.

/c/ C. Francis Murphy
C. FRANCIS MURPHY
Corporation Counsel, D. C.

/s/ Louis P. Robbins
LOUIS P. ROBBINS
Principal Assistant Corporation Counsel, D.C.

/s/ John C. Salyer
JOHN C. SALYER
Assistant Corporation Counsel, D. C.

Attorneys for District of Columbia
District Building
Washington, D.C. 20004

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing motion to recall mandate was mailed, postage prepaid, to Gilbert Hahn, Jr., Esquire, Amram, Hahn & Sandground, 700 Colorado Building, Washington, D.C. 20005, this 13th day of March, 1975.

/s/ John C. Salyer
Assistant Corporation Counsel, D. C.

Exhibit B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 74-1482 SEPTEMBER TERM, 1974

Civil Action 1488-73
Metropolitan Washington Coalition for Clean Air, et al.

v.

FILED MAR 31 1975

District of Columbia, et al.,

HUGH E. KLINE
Clerk

Appellants

NO. 74-1507 Civil Action 1424-73
Metropolitan Washington Coalition for Clean Air, et al.,

Appellants

v.

District of Columbia,
a municipal corporation

Before: Wright and Leventhal, Circuit Judges

O R D E R

On consideration of appellees-appellants' motions for extension of time for reconsideration and to recall mandate, and of the oppositions thereto, it is

ORDERED by the Court that the aforesaid motions are granted and the Clerk of the District Court is requested to return forthwith the certified copy of this Court's order of March 11, 1975, and, it is

FURTHER ORDERED by the Court that the time for filing a motion for reconsideration is extended for a period of 10 days from the issuance of this Court's opinion.

Per Curiam

For the Court:

HUGH E. KLINE, Clerk

By: /s/ Robert A. Bonner
Robert A. Bonner
Chief Deputy Clerk